The challenge to academic integrity posed by freedom to copy (public domain and open licences) : a French and international perspective

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THE CHALLENGE TO ACADEMIC INTEGRITY POSED BY FREEDOM TO COPY (PUBLIC DOMAIN AND OPEN LICENCES): A FRENCH AND INTERNATIONAL PERSPECTIVE

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1. Introduction

Many breaches of academic integrity[34] identified and classified by the Institute of Research and Action on Fraud and Plagiarism in Academia (IRAFPA)[35] relate to the authorship of research findings (publishing the work of third parties in one's own name, being named as co-author of a publication without having made a significant contribution to the work, omitting the names of co-authors, etc.).[*] Attribution of

[34] The author of the article wishes to thank Ms. Miriam Watchorn and Juriscope (Poitiers) for the translation.

[35] https://irafpa.org/en/about-us/rules-of-academic-integrity/, accessed 23, September 2022.

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authorship will be the main focus of attention here. Inaccurate citation of earlier sources will also be dealt with on an ancillary basis. However, self-plagiarism (artificially enhanced scientific output with nothing new added), a specific issue that has both ethical and legal[36] ramifications, will not be discussed here.

As plagiarism has already been defined elsewhere (including by Guglielmi & Koubi, 2012; Latil, 2017; Maurel-Indart, 2011; Simonnot, 2014), I will content myself with minor remarks in this regard. There is a certain ambiguity between the concept of plagiarism, which is essentially non-legal,[37] and the legal concept of copyright infringement. Unauthorized use of the original formal features of works of the mind constitutes copyright infringement, an offence under intellectual property law. This is different from plagiarism in the literary sense, defined as "somewhere between slavish copy and creative rewriting" (Maurel-Indart, 2012, p. 57; our translation), which involves taking the ideas of others and rewording them. However, plagiarism is sometimes understood in a wider sense, incorporating copying and pasting, which can be classified as copyright infringement. Professor Emmanuel Dreyer, who prefers "a very narrow definition of plagiarism as distinct from

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and international perspective", in: Bergadaà, Michelle, and Peixoto, Paulo (Eds.), *The New Boundaries of Academic Integrity*, Geneva: Globethics Publications, 2024, pp. 151-168. DOI: 10.58863/20.500.12424/4307054

[36] If an author assigns exclusive initial publication rights to a publisher and then reuses some features of the original publication in a new one, this constitutes an infringement of the rights of the publisher and could result in the author being held liable.

[37] At least in France. Plagiarism is explicitly enshrined in law in other legislative systems. See, for example, article 32 of Tunisian decree-law 2011-115 of 2 November 2011 on freedom of the press, printing and publishing industry. See also article 4 of Romanian law 206/2004.

copyright infringement" (Dreyer, 2012, p. 187; our translation), deplores this conflation. Rather than enter into this debate, I will instead focus on academic integrity. Although the two terms are distinct, disingenuously replicating and rewording the work of others without acknowledgement (plagiarism in the strict sense of the word) and crude, slavish copying (included in the broader definition of plagiarism) both affect academic integrity and must be taken into consideration, in my opinion.

In either case, action can be taken for copyright infringement when the scientific work in question is copyright-protected and the dispute centres on the reproduction of original features (of either content or structure). However, regardless of the weight and relevance of such legal action (compared to disciplinary proceedings, for example) or the likely outcome (de Gourcuff, 2021), it provides only a partial response to scientific plagiarism. Ideas, methods, and theories cannot be copyright-protected because they are deemed to be in the public domain. But appropriating the work of others is undeniably contrary to scientific integrity…[38]

The public domain is defined in intellectual property law as a situation where a creation is "available to and freely usable by all" (Lucas et al., 2017, s. 652; see also *Domaine* in Cornu, 2022). Content is freely usable if the subject matter at issue is not protected under intellectual property law, and particularly if the features reproduced lack originality. For example, the Bordeaux court of appeal recently dismissed copyright infringement proceedings by a research lecturer, holding that

> "copyright protection for scientific texts requires one to demonstrate that the formatting and layout of the text bear the stamp of its author's personality; scientific works are not protected by copyright for their scientific content insofar as it relates to trivial or

[38] See article 2 of the WIPO Copyright Treaty of 1996; on this issue, see also Bernault (2012).

necessary technical or scientific processes or findings that are not themselves protected by copyright.[39] [our translation]"

Yet the expression "public domain" is also commonly used in reference to protected creative works for which the patrimonial rights of exploitation has expired (generally 70 years *post mortem auctoris* in French copyright law) and which can therefore be used without authorization. Freedom to copy research findings can also surface in a third scenario, different from the two outlined above: copyright holders can opt to exercise their right of exploitation by authorizing third parties, in advance, to reproduce or represent their work. This practice is also known as "copyleft" (Xifaras, 2010, p. 50)[40] or public domain by consent (Clément-Fontaine, 2019). Open licences, GNU licences, Creative Commons, etc., are all examples of this model.

Freedom to copy, as described above, exacerbates the risk of infringement of academic integrity, namely the risk that third-party work will be appropriated or that earlier research findings will be misrepresented. This chapter will focus only on the issue of freedom to use (specifically freedom to copy), as distinct from freedom of access —even though the two issues are often examined together. For example, the aim of the free software movement, specifically the GNU licence launched by Richard Stallman, is to ensure open access to source code and freedom to copy, distribute, and modify software.[41] Similarly, the Open Science movement recommends providing users with "a free,

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[39] Court of appeal (CA) Bordeaux, 11 May 2021, case 18/02506, *LEPI*, Dec. 2021, no. 11, 200l3, obs. A. Zollinger.

[40] However, strictly speaking, this expression does not include licences with a 'ShareAlike' clause stipulating that works derived from a work made available under open licence must also be made available in the same way (Clément-Fontaine, 2019, s. 52).

[41] Clément-Fontaine (2019), particularly section 6.

irrevocable, worldwide, right of access to, and a license to copy, use, distribute, transmit and display the work publicly and to make and distribute derivative works, in any digital medium for any responsible purpose, subject to proper attribution of authorship".[42] In France, article L. 533-4 of the research code adopts what is known as the "green open access" route,[43] allowing authors to make publicly funded scientific papers freely available on open digital archives under certain conditions—after 6 or 12 months if first publishing rights are assigned, for example. Paragraph II of the same article provides that scientific data that are publicly available can be freely reused unless they are protected by a specific right or a particular regulation. While freedom to access research findings and freedom to copy such findings are sometimes considered together, I will argue that they are in fact separate issues, giving rise to different questions. Opinion is divided as to the impact of increased access to research findings on academic integrity. Some warn that ethical benchmarks are becoming increasingly vague now that "knowledge is instantly available on the web" (Benghozi & Bergadaà, 2012, p. 207; our translation). Others argue that the internet can help combat plagiarism (or at least, basic copying and pasting) as plagiarism detection software gradually incorporates open-access information sources (Simonnot, 2014, p. 231).

My contention is that freedom to copy, either because of lack of protection under intellectual property law or because the rightholder allows their work to be reused via open licensing, affects research ethics more directly. From both a psychological and a legal perspective, such freedom might encourage behaviour that most would consider contrary to academic integrity and could make it even harder to counter fraudulent

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[42] Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities of 22 October 2003.

[43] For more on this route and what differentiates it from 'gold open access', see, for example, Bernault (2016, p. 43 et seq.) and Piron (2015).

practices. I will attempt, first, to investigate the problem from a legal perspective and, second, to propose potential solutions to help resolve such difficulties.

2. Difficulties Arising from Freedom to Copy Scientific Findings in the Public Domain by Law or by Consent

There are a number of legal solutions available to counter the risks of earlier scientific findings being appropriated or misrepresented, even in cases where the principle of freedom to copy applies. However, such solutions are incomplete.

2.1 Apparent legal response

Regardless of whether scientific findings characterized as original literary and artistic works are out of copyright (generally 70 years after the author's death) or are made available under open licence, the author's moral rights, in particular the right of attribution of authorship and the right to the integrity of the work, are not affected. In French law, these moral rights are "perpetual, inalienable and imprescriptible" (article L. 121-1 of the intellectual property code) and are also a matter of public policy.[44] After an author's death, their successors or executors can exercise their moral rights. The ministry of culture could also, in theory, bring proceedings on the basis of article L. 121-3 of the code (Lucas et al., 2017, s. 699). Because moral rights are inalienable and a matter of public policy, they cannot be transferred or waived by rightholders. This means that, under French law, open licences do not entail the right to waive attribution. Note that, even with the most open form of Creative Commons licences (Creative Commons Zero, or CC0), copyright and

[44] See, in particular, Court of Cassation (Cass.) 1st civil chamber, 28 May 1991, no. 89-19522 and 89-19725, Asphalt Jungle case.

related rights can only be waived "to the greatest extent permitted by, but not in contravention of, applicable law". Rights can only be surrendered to the extent permitted by applicable national law and authors can assert their moral rights at any time. Many open licences require authorship attribution (see various CC BY Creative Commons licences and open-source licences[45]), reducing the risk that users will appropriate such content. Other types of open licences include other requirements,[46] and it would be useful to examine these closely to determine how much freedom to copy users actually have (non-compliance in particular could result in licence termination and/or legal challenges based on moral and/or patrimonial rights). Plagiarism involving the copying of open-source content therefore needs to be examined through the lens of national public policy provisions and of licensing terms and conditions.

What happens when scientific findings that are not protected by copyright law are copied? Are they protected under other intellectual property rights? When scientific activity leads to the filing of a patent, the resulting monopoly excludes unauthorized third-party exploitation of the invention itself. However, patent infringement proceedings cannot be brought in cases where third parties misleadingly pass scientific data or findings off as their own but do not actually make use of the invention per se. Inventors whose rights are infringed by the filing of a patent can take action to assert authorship of the invention unless they have previously waived this right. By contrast, inaccurately referencing an inventor in patent filings does not entail invalidity (Basire, 2015, s. 10). Another remedy may apply when scientific findings are part of a protected database. Because of the substantial investment involved,

[45] At least, as defined by the open-source initiative: see Clément-Fontaine (2019, s. 54).

[46] For example, users can be prohibited from modifying or adapting licensed content, such as in ND Creative Commons licences.

database producers have *sui generis* protection to prevent the extraction and/or reuse of database content (article L. 342-1 of the intellectual property code). This basis could therefore be used as an indirect means of taking ownership of information deemed free to use and as such unprotectable under copyright law.

Nonetheless, as we will see, in cases where there is no protection under copyright law, the most effective means of recourse against plagiarism is to take action under civil liability law for parasitism (also known as "free riding", where an economic operator takes unfair advantage of the value created by the intellectual work or investment of another economic operator) on the basis of article 1240 of the French civil code. This requires one to establish fault, damage, and a causal link between the two).[47] In 2004, the Paris court of appeal sanctioned a plagiarist for copyright infringement for reusing original formal features and also for parasitism for appropriating the work of another researcher.[48]

However, when scientific findings are not protected by intellectual property law, the principle of the free circulation of ideas and, more generally, of freedom of expression has particular force and could take precedence. The current legal response to protecting scientific integrity is therefore inadequate.

2.2 Inadequate legal response

While in theory the various legal solutions discussed above cover all infringements of scientific integrity in the situations investigated, in each case the scope is quite restricted.

For example, moral rights in relation to copyright-protected scientific works vary from country to country. While authorship rights and the right

[47] See, for example, Judicial court (TJ) Paris, 3rd ch., 21 Jan. 2022, no. 20/00172, *LEPI*, April 2022, no. 4, DPI200s4, obs. A. Zollinger.

[48] CA Paris, 4 June 2004, RG no. 1998/07656, *LPA* 28 Oct. 2005, no. 215, p. 14, obs. M. Poumarede.

to the integrity of a work have basic protection under article 6bis of the Berne Convention of 1886, moral rights have different protection periods and, in some national legislative systems, can even be waived. This is the case in the United Kingdom and in Ireland, where moral rights lapse at the same time as patrimonial rights.[49] In these countries, the effects of extremely open public-domain licences such as CC0 licences, which (unlike the above-mentioned CC BY-type licences) do not make provision for authorship rights, are likely to be particularly strong and not necessarily consistent with the upholding of academic integrity...

Even in countries such as France where moral rights have better protection, works in the public domain or under free licence may not be fully protected. Heirs (assuming that there are any and that their standing has been established) become less likely to assert their moral rights as time goes by. Establishing copyright infringement could be difficult in such cases, especially given that plagiarism detection software might not include older works. And if plagiarism is not identified, either because it has not been detected by detection software or because the rightholders have not come forward, there are no possible legal or disciplinary responses available. It is doubtful whether authors who voluntarily make their work open source will bother to assert their moral rights in jurisdictions where they cannot be waived. Upholding scientific integrity cannot therefore rely solely on rightholders asserting their moral rights.

When scientific findings are not protected under intellectual property law, it is difficult to establish plagiarism through an action for parasitism. Wrongful conduct, which cannot be based on mere similarity of subject matter or on the reproduction of trivial, commonplace features, can be

[49] For the United Kingdom, see sections 86 and 87 of the *Copyright, Designs and Patents Act,* 1988. For Ireland, see articles 115 and 116 of the *Copyright and Related Rights Act,* 2000.

difficult to characterize.[50] The Court of Cassation has also previously ruled that the right to freedom of expression is limited only in specific circumstances laid down by law.[51] This makes it more difficult to sanction plagiarism in the strict sense of the word based on general civil liability principles.[52] In fact, the way in which the scope of intellectual property and the exceptions thereto are defined outlines an intangible boundary between what comes under the control of rightholders and what is freely usable. An action for parasitism must not have the effect of significantly shifting this boundary or allowing an informal kind of appropriation of features that do not meet the conditions for protection under intellectual property law. Where there are no intellectual property rights, the principle is that freedom exists. The courts will be mindful of this and can be expected to require plaintiffs to be specific when claiming wrongful conduct.[53] Hopefully, the courts will be more responsive if plagiarism is identified in works that claim to be scientific (Cornu, 2010, p. 89). However, the flexible framework of civil liability provides no guarantee in this regard. What's more, authors who make their work or scientific findings freely available will not generally resort to legal action for parasitism. If they do, the courts will most likely see the open licence as a factor that mitigates (or even nullifies) both the wrongful nature of the act of copying and the damage suffered by the plagiarized author, except in cases where the plagiarizer is in breach of the licensing terms. The disciplinary committees of research and educational institutions can also find it very difficult to make determinations in such cases, even assuming cases are brought before them.

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[50] First Instance Court (TGI) Lille, 1st ch., 12 February 2015, *Légipresse*, June 2015, no. 328, p. 356, comm. A. Zollinger.

[51] Cass. 1st civil chamber, 22 January 2014, no. 12-35.264.

[52] See Latil (2017, p. 61) discussing the ruling of Cass. 1st civil chamber, 2 July 2014, no. 13, 16730.

[53] See ,for example, TJ Paris, 3rd ch., 21 Jan. 2022, *op. cit*.

The aim is to improve the legal (and disciplinary) response to scientific plagiarism without overstepping the mark in terms of freedom of expression and the free circulation of ideas, principles that have particular weight in relation to features that are already in the public domain, whether by law or by consent.

3. Proposed Responses to the Challenge of Upholding Academic Integrity in the Public Domain by Law or by Consent

Acceptance of the principle based on the idea of "scientific authoriality" (Galvez-Behar, 2010) would certainly help improve the protection of academic integrity in the situations outlined above. It could also enhance existing legal obligations and grounds for action.

3.1 Standardize ethical principles of authorship attribution and integrity of scientific work

Between the two world wars, attempts in France and internationally to agree on a definition of scientific authorship encompassing both moral rights and a form of *droit de suite*[54] ultimately came to nothing (Galvez-Behar, 2019). The aim of the Geneva Treaty of 3 March 1978 was to institute the international recording of scientific discoveries and ensure some measure of legal recognition for them.[55] Even so, article 2 states that recording "does not affect the free use of the ideas contained in recorded scientific discoveries". Signed by only five states in 1978, the treaty has never come into force. These previous failures should be borne in mind in any discussion on the authorship of scientific findings that involve theories and discoveries not protected by intellectual property law.

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[54] Usual tranlated as resale right.

[55] Defined by the treaty as 'the recognition of phenomena, properties or laws of the material universe not hitherto recognized and capable of verification'.

Given the difficulty of protecting authorship rights to scientific findings outside what can be protected under copyright law (expression in an original form) or patent law (the naming of inventors when filing a patent—although even this minimal requirement is under-enforced), the question should perhaps be looked at from the dual perspective of ethics and of policies to promote scientific integrity. Charters and codes of conduct abound, in internal, national, European, and international institutions (FormaDoct, 2020). Some of these are of particular interest for the purposes of this chapter. While neither the European Charter for Researchers (a non-binding text issued further to a European Commission recommendation in 2005) nor the Singapore Statement on Research Integrity of 2010 has much to say on the topic of plagiarism, the European Code of Conduct for Research Integrity drawn up by ALLEA, the European Federation of Academies of Sciences and Humanities, is more specific. Article 3.1 identifies a number of practices including plagiarism, defined as "using other people's work and ideas without giving proper credit to the original source", thus violating the rights of the original author(s) to their intellectual outputs. However, the reference to violations of authors' rights side-steps the issue because the work and ideas used may not be copyright-protected. The code of conduct for scientific integrity drawn up by the Swiss academies of arts and sciences seems more promising. Article 4.4 provides a definition of authorship and article 5.2.4 defines plagiarism as "using other people's work (including unpublished sources), ideas (including structure), or formulations without giving proper credit to the original source".

In light of the above, it would be useful to take a more standardized approach to the issue of scientific plagiarism, bearing in mind the fact that behaviour that is censured may not necessarily breach intellectual property law. Attribution of authorship, not just of copyright-protected works but also of research activities, data, theories, discoveries, and

methods, should be established as a general principle. Unlike early-twentieth-century attempts to establish the concept of authorship of scientific findings, the humanities and social sciences should be included, and not just the hard sciences. Attribution of authorship could be combined with an obligation not to misrepresent or distort the work of others. Partial citation would not, however, be classed as distortion. The attribution and integrity of scientific contributions could be laid down as a general principle inspired by the current wording of article L. 121-1 of the intellectual property code. This ethical principle (already contained in various formulations in academic regulations and charters) could form the basis for decisions, varying according to seriousness in line with the principle of proportionality: a factor in the assessment of a dissertation; unfavourable opinion in relation to a defence or accreditation to supervise research; denial of or removal from research and lecturing duties; denial of promotion; etc. The point here is not so much to defend the particular interests of plagiarized authors as to defend the general interest by safeguarding the honesty and quality of public research. Decisions would not have to depend on the plagiarized party taking action (unlikely, as we have seen, for work that is in the public domain or under open licence). If the principle were enshrined as public policy, the open-licence argument could not be used. Enshrining the principle of authorship of scientific findings regionally or internationally would help reduce the effects of disparate legislative systems discussed above. But to start moderately, explicitly inserting such a principle in the French research code (e.g., article L. 212-2 on scientific integrity) would send a positive signal and would reduce recourse to locally devised charters and regulations. The point here would be to standardize, clarify and expand existing solutions to safeguard academic integrity. This ethical principle could also help strengthen or clarify various obligations and legal remedies.

3.2 Clarify existing obligations and courses of legal action

As discussed above, current legal responses to plagiarism mainly include copyright infringement proceedings and actions for parasitism. But when the plagiarized author is long dead and their heirs are unknown or uninterested, action is unlikely. The idea has already been mentioned above, based on article L. 121-3 of the French intellectual property code, that the ministry of culture, for example, could take legal proceedings to defend an author's moral rights. However, that article refers only to situations of manifest misuse or non-use by heirs of their right of disclosure, an attribute of moral rights that is distinct from the right to attribution of authorship and to the integrity of the work. Explicitly extending the scope of this provision and increasing its application would help safeguard authors' moral rights over the long term (to this author's knowledge, only one case has so far been referred by the minister; Pollaud-Dulian, 2004).

The difficulty of establishing parasitism in cases involving "pillaged" scientific content and the reluctance of the Court of Cassation to sanction violations of freedom of expression outside cases specifically identified by law have already been noted. Enshrining the principles of the right to assert authorship and of the integrity of scientific contributions could help address these difficulties. Action could be taken by a plagiarized author based on both this ethical obligation and article 1240 of the civil code. On 31 March 1999, the regional court of Paris handed down a solution along these lines.[56] In that case, a PhD student claimed that their thesis supervisor had taken numerous passages and tables from a preliminary draft written by the student, reproducing them in another work. Although it could not rule on the question of copyright infringement, the court did find that the student had a legitimate interest in seeking the application of

[56] TGI Paris, 1st ch., 31 March 1999, *RIDA*, Jan. 2000, no. 183, p. 333, obs. A. Kéréver.

rules in use in the scientific community to the use and the publication of research work. It also found that this interest was protected under article 1382 of the civil code in cases where the original author or work was not named or in cases involving distortion or parasitism. Recognizing the principle of authorship attribution and the integrity of scientific contributions in research law could help clarify the usages mentioned above but the link to the current article 1240 of the civil code would remain the same as described in the 1999 case. Data and ideas cannot be copyright-protected and are in the public domain. The aim here is to combat specific practices to ensure that research work is honest and of good quality. Copying the work of others could be sanctioned differently depending on the setting or type of discourse, as is standard in European law on freedom of expression.[57]

Similarly, by invoking both the principle proposed and the requirement under article L. 611-9 of the French intellectual property code to name the inventors when filing a patent, inventors could object to inaccurate attribution and could also request rectification, at least in the case of publicly funded research (note, however, that an inventor can choose not to be identified). This could be used to sanction failure to name inventors, which would be an improvement on the current unsatisfactory situation.

The above solutions provide for a minimal form of scientific ownership, with a moral dimension to ensure that the contribution of researchers is properly acknowledged and academic integrity is upheld. However, enshrining the fight against scientific plagiarism as a principle of public policy that extends beyond the boundaries of copyright infringement and that cannot be circumvented through open licensing would not remove the problem of determining which types of behaviour should be considered lawful but would merely move the goal posts.

[57] See, for example, ECHR, 10 Jan. 2013, no. 36769/08, Ashby Donald et al. v France, section 39, *Comm. com. électr.*, May 2013, étude 8, A. Zollinger.

Beyond what degree of similarity should failure to reference previous work be considered as a breach of ethical principles and as potentially incurring liability?

The free circulation of ideas must be safeguarded to avoid restricting freedom of expression or impeding research activities due to fears of the potential consequences of accidental similarities or imprecise recollection. Combating scientific plagiarism must therefore go hand in hand with the assertion of several freedoms: the freedom to accidentally rediscover work; the freedom to use a now-standard term or formula coined by a previous researcher; the freedom (in good faith) to imperfectly grasp and inaccurately transcribe a complex theory (as opposed to inaccurate citation); and so on. The key here would be to define the boundaries of academic integrity in two ways: by characterizing exactly what violation is and by clarifying what can be tolerated. A balance could perhaps be found by characterizing as plagiarism situations that are not covered by copyright but where there are similarities that cannot be accidental, for example because there is a connection between plagiarizer and plagiarized or because a data set or an intellectual construction (rather than some isolated features) has been lifted wholesale. But finding and establishing that balance will not necessarily be easy.

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